SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 276

EARL S. WORSHAM, TRADING AS WORSHAM BROTHERS,
Petitioner,

vs.

THE UNITED STATES,
Respondent

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

I. Assignments of Error

(a) *The Court of Claims has altogether disregarded the findings and conclusions of the Contracting Officer which by agreement of the parties were to be taken as conclusive.*

The contract provisions were as follows:

Article 9 (R. 10-11).

"The contracting officer • • • shall ascertain the facts and the extent of the delay and extend the time for completing the work when in his judgment the findings of fact justify such an extension, and his findings of fact thereon shall be final and conclusive on the parties hereto, subject only to appeal, within 30 days, by the contractor to the head of the department concerned, or his duly authorized representative, whose decision on such appeal as to the facts of

delay and the extension of time for completing the work shall be final and conclusive on the parties hereto."

Article 15 (R. 13):

"*Disputes:* Except as otherwise specifically provided * * * all disputes concerning questions arising under this contract shall be decided by the contracting officer or his duly authorized representative, subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto as to such questions."

Article 27 (R. 19):

"*Definitions.*—(b) The term 'contracting officer' as used herein shall mean the officer who signs the contract on behalf of the Government, and shall include his duly appointed successor or his duly authorized representative."

The contracting officer was the Chief of the Construction Division and at the time the contract was made was Brigadier General P. W. Guiney (R. 20).

On August 6, 1936, the Acting Chief, Construction Division, who obviously was the contracting officer, or the successor of the original contracting officer, made this finding (R. 32):

"With reference to your letter of July 11, 1936, requesting an extension of time for performance of your contract No. W 6119 qm-54, dated November 23, 1935, for the construction and completion of one barracks building at Fort McClellan, Alabama, due to insufficient supply of qualified labor available through the source of procurement stipulated in said contract, you are advised that an investigation by this office has disclosed that work on the project as a whole was delayed one hundred and twenty days as a result thereof.

"Under the provisions of Article 9 the completion time of Contract No. W 6119 qm-54 is hereby extended one hundred and twenty days beyond the completion date stipulated therein" (R. 32).

This finding of the contracting officer without finding that same was made as a result of fraud or through mistake so gross as to import bad faith, is completely nullified by the findings of fact and opinion of the Court of Claims herein (R. 29-46).

(b) *The decision of the court as thus made completely ignores a long line of decisions both by the Court of Claims and this Court which give finality to the findings of the contracting officer where the contract so provides in the absence of any showing of fraud or of such gross mistake as to import bad faith on the part of the deciding officer.*

The cases are numerous and unanimous in the Court of Claims and in this Court in enforcing the rule that where parties have so agreed, the decision of the contracting or other specified officer, in the absence of any showing of fraud or of such gross mistake as to import bad faith, is to be accepted as final.

In *Brinck* v. *United States*, 53 C. Cls. 170, 176, the rule was thus stated:

"After a careful review and consideration of the decisions of this court and of the Supreme Court of the United States the following seems to be the well-established rule: Where there is a provision in the contract making the decision of an engineer officer or other officer final as to quality and quantity, distance to be ascertained, classification of material, or any other subject matter in the contract which may be matter of dispute and which may arise during the execution of the work, the decision of the engineer or other officer will be treated as final by the courts, and

will not be subject to review by them in the absence of fraud or such gross error as implies bad faith, or a failure to exercise an honest judgment in the premises." (Citing numerous cases.)

In a later case, *McShain Company* v. *United States*, 83 C. Cls. 405, 409, the present Chief Justice writing the opinion of the court said:

> "The contracting officer was the architect of the capitol and he did make a finding of fact that the contractor had been unavoidably delayed by unforeseen events beyond his control and without fault or negligence. The Comptroller General subsequently decided that the contractor was liable for 9½ days' delay and deducted liquidated damages in the sum of $1,662.50. Neither fraud nor bad faith is alleged or proven. This court and the Supreme Court by numerous decisions have held there is no going behind the decision of the contracting officer when the contract provides that 'his finding of facts therein shall be final and conclusive on the parties thereto.' The action of the Comptroller General was without legal authority. *Kihlberg* v. *United States*, 97 U. S. 398; *United States* v. *Gleason*, 175 U. S. 588; *Sun Shipbuilding & Dry Dock Co.*, 76 C. Cls. 154; *Penn Bridge Co.* v. *United States*, 59 C. Cls. 892; *Carroll* v. *United States*, 76 C. Cls. 103, where all the cases are fully reviewed; *Albina Marine Iron Works, Inc.*, v. *United States*, 79 C. Cls. 714."

Other cases in the Court of Claims to like effect, excluding those cited by the Court above, are:

Kennedy v. *United States*, 24 C. Cls. 122;
Barlow, et al. v. *United States*, 35 C. Cls. 514;
McLaughlin & Co. v. *United States*, 37 C. Cls. 150;
Pacific Hardware & Steel Co. v. *United States*, 49 C. Cls. 327;
McBride Electric Co. v. *United States*, 51 C. Cls. 448;
Pelton Water Wheel Co. v. *United States*, 55 C. Cls. 31;

National Contract Co. v. *United States,* 59 C. Cls. 441;
Lustbader v. *United States,* 62 C. Cls. 549;
Kohlman v. *United States,* 63 C. Cls. 604;
Stewart & Co. v. *United States,* 71 C. Cls. 126;
Mittry, et al. v. *United States,* 73 C. Cls. 341;
Pope v. *United States,* 76 C. Cls. 64, 101; certiorari denied 288 U. S. 610;
Arundel Corporation v. *United States,* 79 C. Cls. 343, 362;
Valley Construction Co. v. *United States,* 92 C. Cls. 172, 175.

In a leading case in this Court, *United States* v. *Gleason,* 175 U. S. 588, 602, the rule was thus stated:

> "Another rule is, that it is competent for parties to a contract, of the nature of the present one, to make it a term of the contract that the decision of an engineer, or other officer, of all or specified matters of dispute that may arise during the execution of the work shall be final and conclusive, and that, in the absence of fraud or of mistake so gross as to necessarily imply bad faith, such decision will not be subjected to the revisory power of the courts."

Among other cases of similar import may be mentioned the following:

Ripley v. *U. S.,* 223 U. S. 695;
Merrill-Ruckgaber Co. v. *U. S.,* 241 U. S. 387, affirming 49 C. Cls. 553.
Pawling & Co. v. *U. S.,* 273 U. S. 665, affirming 60 C. Cls. 699.

So far as the reports disclose there has never been a case where either the Court of Claims or this Court has either ignored or set aside the findings and decision of the contracting officer on a question of fact where the contract

made such decision final on the parties, except where there was a showing that such finding was the result either of fraud or collusion or of some gross mistake importing bad faith.

The present decision of the Court of Claims seems to fly in the face of all the decided cases and ignores a principle of law which had been thought to be irrevocably settled.

> (c) *If the contracting officer's decision is to be accepted as correct, obviously the Court of Claims erred in not rendering judgment for whatever increased costs were occasioned the contractor by the failure of the United States to supply an adequate quantity of labor when needed.*

The increased costs were clearly established. The Court, however, has not found the amount thereof and it would be for this Court to remand the case to the Court of Claims for whatever additional action is necessary.

(d) It may be added in conclusion that many, many thousands of contracts have been made by the Government, particularly during the present war emergency, and it is not unlikely that many cases will arise involving this very question. The question is one of prime interest and the principle should be authoritatively decided by this Court.

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